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CONFIDENTIAL   A002A65
THOMAS E. GIVENS   APRIL 20, 2006

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 1            IN THE UNITED STATES DISTRICT COURT
                WESTERN DISTRICT OF MICHIGAN
 2                    SOUTHERN DIVISION

 3

 4    JOEL GOLDMAN,                        )
                                           )
 5                    Plaintiff,           )
      vs.                                  ) CASE NO.
 6                                         )  1:05 CV 0035
      HEALTHCARE MANAGEMENT SYSTEMS, INC.)
 7    and THOMAS E. GIVENS,                )
                                           )
 8                    Defendants.          )
                                           )
 9    _____)

10         THE DEPOSITION OF

11         THOMAS E. GIVENS

12         Taken on Behalf of the Plaintiff

13         April 20, 2006

14

15         C O N F I D E N T I A L
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20    _____

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25    FILE NO.:  A002A65
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1   of the statistics and produces reports on these

2   statistics, but all of those answers, all of your

3   answers do not relate to the software that Mr. Goldman

4   claims is infringed; is that correct?

5   A.   That's correct.

6   Q.   So the software that was installed at these 17

7   AMC hospitals, did that -- did any of that medical

8   records code include any of the code that plaintiff

9   claims is infringed in this lawsuit?

10   A.   In '83 after the group was finished is when we

11   began to install software that is in dispute.

12   Q.   Okay. So it was installed at -- was it

13   installed at all 17 hospitals?

14   A.   No.

15   Q.   Was it installed at approximately five

16   hospitals, then?

17   A.   To the best of my recollection.

18   Q.   That's a yes?

19   A.   No, that's to the best of my recollection.

20   Q.   But the answer is affirmative, is a yes, to the

21   best of your recollection it was installed at

22   approximately five hospitals?

23   A.   That's correct.

24   Q.   And those five hospitals were sold to a company

25   called HCA?

1   A.   In a subsequent event, yes.

2   Q.   Who owned them before they were sold to HCA?

3   A.   Forum Group.

4   Q.   And who owned them before Forum Group?

5   A.   American Medical Centers.

6   Q.   And at what stage was the software, the medical

7   record software in dispute installed? Was it while the

8   hospitals were owned by AMC, while the hospitals were

9   owned by the Forum Group, or while the hospitals were

10   owned by HCA?

11   A.   By the Forum Group.

12   Q.   How long did the Forum Group own these

13   hospitals?

14   A.   I can't give you a definite time.

15   Q.   When did the Forum Group acquire the hospitals?

16   A.   I can't give you an exact date.

17   Q.   Was it while you were at AMC?

18   A.   Yes.

19   Q.   So it was sometime between '81 and '84?

20   A.   Yes.

21   Q.   And you have an approximate year when HCA

22   acquired the hospitals?

23   A.   Yes.

24   Q.   Approximately what year?

25   A.   '85.

1   Q.   Going back to -- we should get a new term for

2   this.

3   A.   When were we going to take that break?

4   Q.   It's a famous lawyer's statement, I have one

5   last question, but we will.

6   The medical records that you worked on while at

7   AMC that were not part of the software at issue in this

8   lawsuit, maybe we call that AMC's -- we call that AMC's

9   self-developed medical records.

10   A.   Okay.

11   Q.   Is that an apt description?

12   A.   However you define it.

13   Q.   So AMC's self-developed medical records

14   programs, was that basically an enhancement of the

15   capabilities of patient accounting and HFMS?

16   A.   Yes.

17   Q.   Just a second.

18   (Recess taken.)

19   BY MR. SMITH:

20   Q.   Mr. Givens, we're back from our break and we

21   would like to move to a slightly different topic, your

22   interactions with Joel Goldman before today.

23   A.   Okay.

24   Q.   Have you met Mr. Goldman before this morning?

25   A.   Yes.

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1   A.   And it included the stuff that was developed at

2   AIC while I was there, plus additional applications

3   that they developed after I left. So we had that, as

4   well as the source code to support those hospitals.

5   Q.   When you left AMC did you retain personally a

6   copy of the source code for the medical records at

7   issue in this lawsuit?

8   A.   No.

9   Q.   When AIC received the contract to provide

10   support for these 17 hospitals you testified that, at

11   that time, AIC obtained the source code for some of the

12   applications, including financial management, HFMS

13   enhancements; correct?

14   A.   That's correct.

15   Q.   At the same time it received those software

16   applications, did AIC also receive copies of the source

17   code for the software at issue in this lawsuit?

18   A.   Yes.

19   Q.   Is this something that you specifically wanted

20   as part of the contract?

21   A.   I had to have it to support the hospitals.

22   Q.   When you say you had to have it, did you also

23   have to have the source code at issue?

24   A.   I had to have all the object and all the source

25   code to support the applications that were in those

1   hospitals that HCA had acquired.

2   Q.   At the time that AIC received this source code

3   and object code, were copies of the medical records

4   software at issue then running in any of Forum Group's

5   hospitals?

6   A.   Yes.

7   Q.   How many?

8   A.   Approximately the five that I mentioned in my

9   interrogatories.

10 Q.   Did you have any personal involvement in

11 installing the software at issue in those four or five

12 hospitals?

13 A.   Yes.

14 Q.   Your involvement was during the time you were

15 at AMC?

16 A.   Yes.

17 Q.   Did you initiate those installations?

18 A.   What do you mean by initiate?

19 Q.   Was it your idea to put the software at issue

20 in those four or five hospitals?

21 A.   It was our company's decision. I was the

22 implementor.

23 Q.   So AMC made the corporation decision to put the

24 source code at issue into these four or five hospitals?

25 A.   Yes.

1   Q.   Who was your first hire?

2   A.   Katie something.

3   Q.   Okay.

4   A.   Katie whatever.

5   Q.   And was she a programmer?

6   A.   Yes.   And receptionist.

7   Q.   And this would have been around 1985?

8   A.   '84.

9   Q.   '84.   And AIC's initial business purpose was a

10   corporate entity -- was it incorporated?

11   A.   Yes.

12   Q.   Its initial purpose was an incorporated entity

13   to do business from your consulting activities; is that

14   right?

15   A.   Yes.

16   Q.   Later on did AIC start developing software

17   applications that it would go out and market to

18   hospitals for installation and sale?

19   A.   Yes.

20   Q.   When did that happen?

21   A.   1986.

22   Q.   What was its first product?

23   A.   The AMC products.   I'm going to refer to

24   anything, if by definition AMC meaning the stuff, or

25   meaning software that came over from AMC to support the

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1   HCA.

2   Q.   All the source code and --

3   A.   Yes, right.

4   Q.   So it included the HFMS enhancements?

5   A.   Yes.

6   Q.   It would include your DRG grouper?

7   A.   And others, and fixed assets that I developed

8   and other products, yes.

9   Q.   Fixed asset software applications that you

10 developed, it would include the source code at issue in

11 this lawsuit?

12 A.   Yes.

13 Q.   And it would include source code that -- well,

14 did it include any other source code?

15 A.   I had source code for everything that was

16 there. I don't know how to define it. All the

17 products that were used to support HCA.

18 Q.   Uh-huh?

19 A.   Which was the financial, GL, AP, fixed asset,

20 medical records, DRG. There was source code for all of

21 that.

22 Q.   Did you, when I say you, did you or AIC pay the

23 Forum Group or HCA for acquiring that software?

24 A.   No.

25 Q.   Was there any written agreement associated with

1   Q.   When you employed an application such as HFMS

2   you spoke with an IBM representative, is that correct,

3   to acquire it?

4   A.   No.

5   Q.   When you used HFMS how did you acquire that

6   source code?

7   A.   Through AMC.

8   Q.   How did AMC acquire it?

9   A.   Through acquisition from IBM.

10 Q.   Were you involved in any of those acquisitions?

11 A.   No.

12 Q.   Did you confer with IBM representatives?

13 A.   No.

14 Q.   Was it your understanding that IBM provided

15 HFMS for free?

16 A.   No.

17 Q.   Was it your understanding that HFMS was

18 provided at a cost?

19 A.   My understanding, at that point in time, is

20 that the software had been substantially modified, that

21 there was no copyright issue, and that basically if you

22 look in the industry as it is today, the high majority

23 of people running on the IBM mini platform that did

24 healthcare, the basis of the software was HFMS. It was

25 kind of a common practice, and IBM really moved out of

1   A.   Approximately?

2   Q.   Approximately.

3   A.   Okay. Fifteen.

4   Q.   When you installed the AMC software, I'll call

5   it, did it always include the medical records software

6   that's at issue in this lawsuit?

7   A.   No.

8   Q.   Did any of the 15 include it?

9   A.   Yes.

10   Q.   About how many?

11   A.   Approximately?

12   Q.   Approximately.

13   A.   Five.

14   Q.   Now, would these five be separate from the five

15   HCA hospitals we discussed earlier?

16   A.   No.

17   Q.   Those would be the same hospitals we have

18   already discussed?

19   A.   Not -- can I give a little history?

20   Q.   Sure.

21   A.   HCA sold off some of those hospitals. So there

22   was maybe three to four of those hospitals that they

23   sold them to another acquirer who wanted to keep the

24   software that already had that software.

25   Q.   Okay.

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1 Q.   In fact, HMS has a file called abstract use in

2 its programs; correct?

3 A.   Yes.

4 Q.   At the time AIC was marketing the software at

5 issue, the software at issue had a file called

6 abstract; correct?

7 A.   Yes.

8 Q.   Was that abstract file used in the financial

9 applications that AIC marketed, the patient accounting

10 records, for example?

11 A.   No.

12 Q.   Okay. The software that AIC marketed, did you

13 have a DRG grouper in that software?

14 A.   Yes.

15 Q.   Whose product was the DRG grouper?

16 A.   I developed the DRG grouper.

17 Q.   Is that the one you developed based on the code

18 that you received from, was it HIS -- HSI?

19 A.   Yes.

20 Q.   That in turn was derived from the Yale --

21 A.   Yes.

22 Q.   Again, the abstract file that was part of the

23 software at issue was created by Mr. Goldman; is that

24 correct?

25 A.   Yes.

1 BY MR. SMITH:

2 Q.   Do you recognize -- this is source code, is it

3 not?

4 A.   Yes.

5 Q.   Do you recognize this as source code that was

6 provided by HMS to the plaintiff in this litigation,

7 this is HMS source code, I guess is what I'm looking

8 for?

9 A.   Yes.

10 Q.   Okay. This is HMS source code, I'll represent

11 to you, that was provided to us by HMS?

12 A.   Uh-huh.

13 Q.   And is for the program MR0E80. It identifies

14 the programmer as Annita Milkwick?

15 A.   Uh-huh.

16 Q.   And the company name, Advanced Information

17 Concepts. Do you see that?

18 A.   Uh-huh.

19 Q.   To the best of your recollection did Annita --

20 was Annita Milkwick the original author of this code?

21   MR. DENNEN: Object to the use of the term

22 author and also to the reference to the code. When you

23 say code, are you referring to the documentation that

24 is put forth on Exhibit 4?

25 BY MR. SMITH:

1   Q.   The answer is yes. It goes really to the word

2   original. To the best of your knowledge, the person

3   who conceived and initially programmed this program,

4   I'll just ask you, was it Annita Milkwick or was it

5   somebody else?

6   A.   I would say it was someone else.

7   Q.   And this is the source code that produces the

8   Executive Summary Report that we've seen as Exhibit 2,

9   and to the best of your knowledge the first version of

10   this program that you saw would have been from AMC; is

11   that right?

12   MR. DENNEN: I'm going to object to that.

13   I don't -- I think you've got a compound question there

14   that assumes a number of -- is making a number of

15   assumptions. If you wish to break it down, feel free

16   to do so. I'm objecting to the form of that question.

17   BY MR. SMITH:

18   Q.   Do you understand the question, Mr. Givens?

19   A.   I thought I did. So repeat the question.

20   Q.   Could the reporter read back the question,

21   please.

22   (The requested proceedings were read back

23   by the court reporter.)

24   THE WITNESS: Question number one, is this

25   source code for the executive summary, yes. Did the

1   first version of this code come from AMC, yes.

2   BY MR. SMITH:

3   Q.   And the first version of this code that came

4   from AMC was provided to AMC by Mr. Goldman; correct?

5   A.   Yes.

6   Q.   Did HMS ever contact Mr. Goldman to obtain his

7   permission to use any version of the source code before

8   you as Exhibit 4?

9   A.   HMS?

10 Q.   Yes.

11 A.   No.

12 Q.   And other than the telephone conversations and

13 the two meetings we have discussed did AMC ever obtain

14 Mr. Goldman's consent to use the source code?

15 A.   Yes.

16 Q.   When was that?

17 A.   During '83.

18 Q.   During the initial meetings?

19 A.   '83, '84, when we were working on the DRGs.

20 Q.   And earlier you weren't able to recall exactly

21 when your phone calls may have transpired between

22 yourself and Mr. Goldman. Do you think some of those

23 phone calls occurred after you had left AMC?

24 A.   No.

25 Q.   Okay. Well, we have a series of exhibits here,

1   Q.   Okay.   I'm not keeping up with... off the

2   record, please.

3   (Recess taken.)

4   BY MR. SMITH:

5   Q.   Mr. Givens, so we're back from lunch.   I would

6   like to show you now Exhibit 39.

7   (Marked Exhibit No. 39.)

8   BY MR. SMITH:

9   Q.   What is this exhibit?

10   A.   39.

11   Q.   Yeah, can you identify it for us?   Do you

12   recognize it?

13   A.   Yes.

14   Q.   Could you describe for us what it is?

15   A.   It says abstract, medical records abstract,

16   Madison file, physical file.

17   Q.   Are you familiar with this file?

18   A.   Yes.

19   Q.   And how it's laid out?

20   A.   Yes.

21   Q.   Was this part of the software application

22   programming that you received from AMC and Paul Agee?

23   A.   I guess.

24   Q.   And was the original author -- well, let me

25   show you Exhibit 38.

1   (Marked Exhibit No. 38.)

2   BY MR. SMITH:

3   Q.   That has been provided to HMS in a document

4   exchange. This is Mr. Goldman's file, also called

5   abstract?

6   A.   Uh-huh.

7   Q.   I won't ask you to compare the two, but to the

8   best of your knowledge is Exhibit 39, was it originally

9   authored by Joel Goldman?

10   A.   I would have no idea.

11   Q.   Was it part of the source code that Joel

12   Goldman provided to you during the meetings at AMC in

13   1983?

14   A.   Yes.

15   Q.   I'm going to show you Exhibit 40.

16   (Marked Exhibit No. 40.)

17   MR. SMITH: Which, Counsel, I don't think

18   you have.

19   BY MR. SMITH:

20   Q.   Exhibit 40, Mr. Givens, is an email with an

21   attachment from Patty Eckler. Do you know, is she an

22   employee at HMS?

23   A.   Yes.

24   Q.   And have you ever seen this document before?

25   A.   No.

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1   Q.   Now, earlier, I believe you testified that

2   nearly all of your customers -- I beg your pardon.   I'm

3   mischaracterizing your testimony.   I believe you

4   testified that approximately 80 percent of your

5   customers would have purchased medical records?

6   A.   Yes.

7   Q.   So HMS, you believe, has more customers than

8   are listed in Exhibit 49?

9   A.   Not many more.

10   Q.   Okay.   By the way, when you sell a customer

11   software, do you install that software for the customer

12   on a computer?

13   A.   Do I?

14   Q.   Sorry, does HMS?

15   A.   Yes.

16   Q.   And is the software that's installed, is that

17   source code or object code?

18   A.   Object code.

19   Q.   As a practice, do you provide your customer

20   with source code?

21   A.   No.

22   Q.   Why not?

23   A.   It's subject to having the application modified

24   and creates support problems.   You don't have control

25   over the product.